



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Abatement Action on Motion  
of the Department of Natural Resources to Remove  
the Alleged Illegal Dam and Pond Constructed and  
Maintained on a Tributary to Tank Creek by James  
Roehl and to Restore the Tributary to Tank Creek,  
Town of Hixton, Jackson County, Wisconsin

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Case No. 3-WC-01-27002BT

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

In May 2000, Randy Roehl contacted the Department regarding the need for a permit to construct a pond on Roehl family property located in the Town of Hixton, T22N, R5W, Jackson County. The DNR advised Mr. Roehl that no permit was needed to construct a pond on this property because there were no navigable waters or wetland on the property.

However, an intermittent, unnamed stream that is a tributary of and flows into Tank Creek, is located on the property.

In December, 2000, WDNR met with James Roehl to discuss the location of the pond and informed Mr. Roehl that the pond and dam did require WDNR permits under Wis. Stat. chs. 30 and 31, and a water quality certification under Wis. Admin. Code chs. NR 103 and 299, because the tributary on which the dam and pond were constructed was a navigable water of the state, the dam and pond affected wetlands adjacent to the tributary, and because maintenance of the dam and pond would be detrimental to the public interest in these waters.

The Department advised Mr. Roehl that it would oppose issuance of permits for the dam and pond. Efforts to resolve the matter informally were not successful.

The Department requested an administrative hearing under Wis. Stat. § 30.03 (4) (a), seeking an order compelling Mr. Roehl to remove the dam and pond and to restore the stream. Mr. Roehl was not necessarily opposed to restoration, but contended that the DNR should provide funding for the restoration efforts.

Prior to the scheduled date of the hearing, the parties reached an Agreement in Principle whereby Mr. Roehl agreed to remove the dam and pond and to restore the stream while preserving his right to pursue a claim against the DNR for the costs he incurred in developing and thence removing the pond at the DNR's direction, among other costs not herein specified.

Upon conferring with the ALJ, it was agreed that the ALJ would issue an Order detailing that the dam and pond shall be removed and the stream restored. Included in that order would be detailed steps regarding the restoration process and timelines for the restoration.

The pond and stream restoration shall be divided into two phases. Phase I would primarily entail breaching the dam and filling a portion of the pond. Phase II would primarily entail restoration of the stream and wetlands, while filling in the remaining pond area.

Both parties agree and understand that Phase I target completion date is mid-September, 2001 and must be completed no later than October 1, 2001, and Phase II will be completed no later than July 31, 2002.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to Wis. Stat. §§ 30.121 and 227.43(1)(b) to hear contested cases and enter necessary orders relating to restoration projects.
2. That pursuant to the stipulation of the parties, the Order set forth herein shall be entered accordingly.

### ORDER

**I. AND THERE HEREBY DOES ISSUE AND PROVIDES** to Mr. Roehl, an Order for the removal of the aforementioned dam and pond and restoration of said stream as described in the foregoing Findings of Fact, subject, however, to the following conditions:

1. The authority herein granted can be amended or rescinded if the removal and restoration becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. Mr. Roehl shall waive any objection to the free and unlimited inspection of the premises, site or facility by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project while Mr. Roehl or his agents are on the premises. If no one is on the premises, then DNR will give Mr. Roehl 48 hours written notice prior to inspection of the premises.
3. A copy of this Order shall be kept at the site at all times during the restoration process.
4. Mr. Roehl shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

5. This Order shall not be construed as authority for any work other than that specifically described herein and in the Findings of Fact.

6. This Order shall not be construed as authority for any work other than that specifically described therein and in the Findings of Fact.

**II. Phase I shall consist of the following:**

1. Step one in the restoration plan should be the draw down of the reservoir, with a drawdown to base flow (i.e., pump the water out of the pond). A hydraulic pump with a capacity of 75 – 150 gpm placed in the deepest portion of the pond will likely draw the pond down within 3 to 5 days.

2. The pump outlet should be placed in the adjacent wetland in a manner that will allow the water to filtrate through the wetland before reentering the stream

3. Once the pond is drawn down, breach the dam and remove the water control structure. Excavate 7-8' out from the centerline at the bottom. (i.e., there will be a hole or opening in the middle of the dam, 14 to 16' wide at the bottom of the hole) Place the spoil from this operation in the excavated pond to fill in the deep hole.

4. Then slope the opening to a ratio of 3 to 1. This slope is needed because of the upstream box culvert, as the box culvert indicates the potential amount of water that could pass through the breach. (If there is no slope or an insufficient slope, a strong flow of water could take out portions of the remaining dam, causing sedimentation and safety problems.)

5. Concurrent with sloping the breach opening, two grade stabilization structures should be placed in the current stream channel. The grade stabilization structures will consist of 6-12 inch diameter rock pounded into the bed of the stream to prevent headcutting. One structure should be placed at the pond spillway location and another at the pond inlet.

6. Any and all exposed area must be seeded to minimize erosion, using oats or winter wheat as a cover crop to allow for quick stabilization of the site. This must be applied at a rate of 1.5 lb. per 1000 square feet. No fertilizer may be used with this application of seed.

7. The work should be started as quickly as possible to provide adequate seed cover to prevent and minimize erosion. The target completion date for Phase I shall be mid-September, 2001 and must be completed by October 1, 2001.

8. AU work should be done during low flow conditions.

9. The water management specialist must be notified within 5 days before any work takes place. The Department may provide on-site alterations.

**III. Phase II shall consist of the following:**

1. Prior to beginning Phase 11, DNR staff will visit the site and help determine a rough graded channel location.
2. The western 3/4 of the pond should be filled with the stockpiled spoil material currently located immediately to the west of the pond.
3. The new stream channel should be designed along the eastern ¼ of the pond. The stream channel elevation should be consistent with the up and downstream elevations of the natural remaining stream, so that the slope of the newly created channel shall be constant, gradual, and will match the existing elevations of the stream at the entrance and exit of the pond upon completion.
4. The width of the channel shall be a maximum of 2 feet wide with a depth of 18-24 inches (upper bank to streambed). This will allow the stream the ability to create its' natural channel.
5. The bank slopes of the new channel shall be no steeper than 2 feet horizontal to 1-foot vertical.
6. Any area exposed during Phase 11 must be seeded using oats, of winter wheat as a cover crop to allow for quick stabilization of the site. This must be applied at a rate of 1.5 lb. per 1000 square feet. No fertilizer may be used with this application of seed.
7. A silt fence should be placed between the channel restoration and the former spoil piles to divert portions of runoff from the disturbed area. Prior to the placement of the silt fence you must contact the DNR for field verification of the optimal location.
8. All work should be done during low flow conditions.
9. The water management specialist must be notified within 5 days before any work takes place.
10. DNR staff may choose to modify this phase depending on the stabilization of the site that has already occurred.

11. All Phase 11 restoration work must be completed by July 31, 2002.

Dated at Madison, Wisconsin on September 24, 2001.

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By: \_\_\_\_\_  
Jeffrey D. Boldt  
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. § 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.

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